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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 MICHAEL VASILIIY KOLESNIK,

10 Petitioner,

11 v.

12 PATRICK GLEBE,

13 Respondent.

CASE NO. C11-5694BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION AND  
DISMISSING PETITION

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15 This matter comes before the Court on the Report and Recommendations (“R&R”)  
16 (Dkt. 30) issued by United States Magistrate Judge Karen L. Strombom on the petition  
17 for writ of habeas corpus brought under 28 U.S.C. § 2254 by Petitioner Michael Vasiliy  
18 Kolesnik (“Kolesnik”), Kolesnik’s objections to the R&R (Dkt. 31), and Respondent  
19 Patrick Glebe’s (“Glebe”) response to the objections (Dkt. 33). Having considered the  
20 R&R, Kolesnik’s objections, Glebe’s response, and the entire record, the Court adopts the  
21 R&R and dismisses the petition for the reasons stated herein.  
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## I. FACTUAL HISTORY

The Court will rely on the factual summary of the Washington Court of Appeals found in the R&R. Dkt. 30 at 1-3 (quoting Dkt. 15, Exh. 2). As the Magistrate Judge states in the R&R, this factual summary is accorded a presumption of correctness under 28 U.S.C. § 2254(e)(1) (Dkt. 30 at 4). *See Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009).

## II. PROCEDURAL HISTORY

Kolesnik was found guilty of one count of assault following a jury trial on December 6, 2006. Dkt. 15, Exh. 1.<sup>1</sup> Kolesnik appealed his conviction and the Washington Court of Appeals affirmed. *Id.*, Exh. 8. Kolesnik sought, and on April 29, 2009, the Washington Supreme Court denied, review. *Id.*, Exh. 9.

On January 28, 2010, Kolesnik filed a personal restraint petition (“PRP”) in the Washington Supreme Court. *Id.*, Exh. 11. The Washington Supreme Court transferred the PRP to the Washington Court of Appeals for initial consideration. *Id.*, Exh. 14. The Washington Court of Appeals denied the PRP (*id.*, Exh. 15)<sup>2</sup> and Kolesnik sought review by the Washington Supreme Court and moved to supplement the record (*id.*, Exhs. 16 & 17). The Commissioner of the Washington Supreme Court denied review and the motion

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<sup>1</sup> The Court notes that Kolesnik, in his objections, argues that the R&R erroneously refers to “two counts of first degree assault” (Dkt. 30 at 1). The record is clear that there is only one count of conviction of first degree assault. Dkt. 15, Exh. 1. This error is not material to the Court’s determination on the petition.

<sup>2</sup> The Court notes that Kolesnik argues that the Magistrate Judge erred in stating that his petition was “denied” by the Washington Court of Appeals, rather than “dismissed.” Dkt. 31 at 2 (citing Dkt. 30 at 4). The Court notes that to the extent there is a distinction, any error is irrelevant to the Court’s determination on the petition.

1 to supplement the record. *Id.*, Exh. 18. Kolesnik moved to modify the Commissioner's  
2 ruling (*id.*, Exh. 19) and on March 29, 2011, the Washington Supreme Court denied the  
3 motion to modify (*id.*, Exh. 20). The Washington Court of Appeals issued a certificate of  
4 finality on April 29, 2011. *Id.*, Exh. 21.

5 On September 1, 2011, Kolesnik filed his petition for writ of habeas corpus under  
6 28 U.S.C. § 2254 in this Court. Dkt. 5. On January 31, 2012, the magistrate judge issued  
7 an R&R recommending that Kolesnik's petition be dismissed. On February 15, 2012,  
8 Kolesnik filed objections to the R&R. Dkt. 31. On March 19, 2012, the Court requested  
9 a response to the objections from Glebe. Dkt. 32. On March 28, 2012, Glebe filed a  
10 response.

### 11 **III. DISCUSSION**

#### 12 **A. Standard**

13 A habeas corpus petition shall not be granted with respect to any claim adjudicated  
14 on the merits in the state courts unless the adjudication either (1) resulted in a decision  
15 that was contrary to, or involved an unreasonable application of, clearly established  
16 federal law, as determined by the Supreme Court; or (2) resulted in a decision that was  
17 based on an unreasonable determination of the facts in light of the evidence presented to  
18 the state courts. 28 U.S.C. §2254(d). Under the "contrary to" clause, a federal habeas  
19 court may grant the writ if the state court arrives at a conclusion opposite to that reached  
20 by the Supreme Court on a question of law or if the state court decides a case differently  
21 than the Supreme Court has on a set of materially indistinguishable facts. *Williams v.*  
22 *Taylor*, 529 U.S. 362, 412-413 (2000). Under the "unreasonable application" clause, a

1 federal habeas court may grant the writ if the state court identifies the correct governing  
2 legal principle from this Court's decisions but unreasonably applies that principle to the  
3 facts of the prisoner's case. *Id.*

4 A determination of a factual issue by a state court shall be presumed correct, and  
5 the applicant has the burden of rebutting the presumption of correctness by clear and  
6 convincing evidence. 28 U.S.C. §2254(e)(1). Further, if the factual basis for the claims  
7 in a habeas petition has not been adequately developed in state court, an evidentiary  
8 hearing may not be held unless the claim (1) relies on a new rule of constitutional law,  
9 made retroactive to cases on collateral review by the Supreme Court that was previously  
10 unavailable, or a factual predicate that could not have been previously discovered through  
11 the exercise of due diligence; and (2) the facts underlying the claim would be sufficient to  
12 establish by clear and convincing evidence that but for constitutional error, no reasonable  
13 fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C.  
14 §2254(e)(2).

15 **B. Kolesnik's Ineffective Assistance Claim**

16 As an initial matter, the Court notes that Kolesnik argues that the Magistrate Judge  
17 erred in stating that his petition was “denied” by the Washington Supreme Court, rather  
18 than “dismissed.” Dkt. 31 at 2 (citing Dkt. 30 at 4). The Court notes to the extent there is  
19 a distinction, the Washington Supreme Court “dismissed” Kolesnik’s petition.

20 First, the Court concludes that the Magistrate Judge did not err in denying  
21 Kolesnik an evidentiary hearing. Kolesnik does not rely on a new rule of law, nor has he  
22 shown that the facts underlying his claims would be sufficient to establish by clear and

1 convincing evidence that, but for constitutional error, no reasonable fact finder would  
2 have found him guilty. Accordingly, the Court concludes that an evidentiary hearing is  
3 unnecessary.

4 Next, Kolesnik objects to the R&R, arguing primarily that § 2254(d) does not  
5 apply because the Washington courts did not adjudicate his claim on the merits. Dkt. 31.  
6 The Court concludes that the state courts did adjudicate Kolesnik's claim on the merits  
7 as, at each level, the opinions stated that Kolesnik failed to meet the standard under  
8 *Strickland v. Washington*, 466 U.S. 668 (1984), to prevail on his ineffective assistance of  
9 counsel claim. Dkt. 15, Exhs. 2, 9, 15 & 18. Therefore, § 2254(d) applies because  
10 Kolesnik's claim was adjudicated on the merits by the Washington courts.

11 Kolesnik has failed to show the decision of either the Washington Court of  
12 Appeals or the Washington Supreme Court was the result of an unreasonable application  
13 of federal law or was based on an unreasonable determination of the facts. *See* 28 U.S.C.  
14 § 2254(d). Both on direct appeal and in reviewing his personal restraint petition, the state  
15 courts concluded that Kolesnik's claim for ineffective assistance of counsel failed under  
16 the two-part standard for evaluating such claims. First, Kolesnik was required to show  
17 that his counsel's representation was so deficient that it "fell below an objective standard  
18 of reasonableness." *Strickland v. Washington*, 466 U.S. at 686. Second, Kolesnik had to  
19 show that the deficient representation prejudiced the defense so "as to deprive the  
20 defendant of a fair trial, a trial whose result is unreasonable." *Id.* As the Magistrate  
21 Judge points out in the R&R, the Washington Court of Appeals, after rejecting  
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1 Kolesnik's claim on direct appeal, again rejected Kolesnik's claim in reviewing his PRP,  
2 stating:

3 Kolesnik had undergone both a competency evaluation and an examination  
4 by the State. He does not show that his counsel's decision not to retain a  
5 defense mental health expert was deficient performance. And even if it  
6 was, he does not show a reasonable probability that the result of his trial  
7 would have been different had his counsel retained a defense mental health  
8 expert. He fails to demonstrate ineffective assistance of counsel.

9 Dkt. 15, Exh. 15 at 1-2.

10 The Court concludes that Kolesnik has failed to show that the Washington Court  
11 of Appeals, the Washington Supreme Court, or the Magistrate Judge, erred in concluding  
12 that his ineffective assistance of counsel claim is without merit. Kolesnik failed to show  
13 that his counsel's choice not to retain a separate mental health expert fell below an  
14 objective standard of reasonableness, or even if it did, that there was a reasonable  
15 probability that the result of the trial would have been different.

### 16 **C. Certificate of Appealability**

17 Under 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b), a  
18 petitioner may not appeal the final order in a habeas corpus proceeding in which the  
19 detention complained of arises out of a state court proceeding or in a proceeding under 28  
20 U.S.C. § 2255 unless the district court or the Ninth Circuit issues a certificate of  
21 appealability identifying the particular issues that may be pursued on appeal. *United*  
22 *States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

To obtain a certificate of appealability, a petitioner must make a substantial  
showing of the denial of a constitutional right. A petitioner must also demonstrate that

1 reasonable jurists could debate whether, or agree that, the petition should have been  
2 resolved in a different manner or that the issues presented were adequate to deserve  
3 encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

4 Here, the Court concludes that Kolesnik has failed to make a substantial showing of  
5 the denial of a constitutional right. In addition, he has failed to show that reasonable  
6 jurists could agree that his petition should have been resolved in a different manner.  
7 Accordingly, the Court concludes that Kolesnik is not entitled to a certificate of  
8 appealability.

9 **IV. ORDER**

10 Therefore, it is hereby **ORDERED** as follows:

- 11 (1) The R&R (Dkt. 30) is **ADOPTED**;  
12 (2) Kolesnik's petition (Dkt. 1) is **DISMISSED**; and  
13 (3) Kolesnik is not entitled to a certificate of appealability.

14 Dated this 10th day of March, 2012.

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17 BENJAMIN H. SETTLE  
18 United States District Judge  
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